No. 77-1633

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAHERA WEINSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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Acting Assistant Attorney General,

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OPINION BELOW

The order of the court of appeals remanding the case to the district court for additional findings on a suppression motion (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. On April 25, 1978, Mr. Justice Marshall denied an application for an extension of time for filing a petition for a writ of certiorari. The petition was not filed until May 8, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether the acts of petitioner in demanding and obtaining money from an alien were "in proceedings relating to naturalization" under 18 U.S.C. 1422.

STATUTE INVOLVED

18 U.S.C. 1422 provides:

> Whoever knowingly demands, charges, solicits, collects, or receives, or agrees to charge, solicit, collect, or receive any other or additional fees or moneys in proceedings relating to naturalization or citizenship or the registry of aliens beyond the fees and moneys authorized by law, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

After waiving a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of receiving fees other than those prescribed by law "in proceedings relating to naturalization or citizenship or the registry of aliens," in violation of 18 U.S.C. 1422. She was sentenced to two years' probation and a $2,500 fine. The court of appeals, after rejecting the contention presented here, remanded the case for a finding on petitioner's allegation that she was denied the right to consult with counsel before making admissions (Br. 2-4). The district court was directed to grant the motion to suppress and to order a new trial if it sustained petitioner's claim; otherwise, the appellate court indicated it would affirm the conviction. On June 22, 1978, the district court rejected the claim (App., *infra*, p. 1a).[1] The court of appeals has not yet entered a final judgment.

The underlying facts are as follows. Yasmin Pirani, a Tanzanian national, entered the United States legally in April 1974 as a nonimmigrant visitor authorized to remain in the country for three months (Tr. 13). She

[1]We reproduce the order as an appendix to this brief.

subsequently obtained permission from the INS to extend her stay (Tr. 14). In August 1975, Pirani was introduced to petitioner by a mutual acquaintance (Tr. 17), and Pirani mentioned to petitioner that she (Pirani) would shortly be forced to leave the United States because her visitor's status was about to expire and she could not obtain another extension (Tr. 18). Claiming to have influence with INS officials, petitioner told Pirani not to worry (Tr. 19).

A few weeks later, petitioner advised Pirani that $300 was required to begin the process (Tr. 23). Before paying petitioner the money, Pirani signed in blank several INS forms obtained for her by petitioner (Tr. 22), the completion of which constitutes the first step for securing an adjustment of status from the agency (Tr. 6). Pirani left the signed forms with petitioner for filing (Tr. 21), and later paid petitioner an additional $500 to complete the transaction (Tr. 24-27).

Petitioner kept the money and never filed the forms. In response to Pirani's repeated inquiries about the progress of her application for an adjustment of status, petitioner blamed the delay on bureaucratic red-tape at the INS (Tr. 22). In May 1976, during questioning by INS investigators about another immigration matter, Pirani disclosed her dealings with petitioner (Tr. 29). Pirani cooperated in the ensuing investigation by agreeing to tape-record several of her telephone conversations with petitioner. During the taped conversations, petitioner represented to Pirani that the $800 had been used to bribe a highly placed "contact" at INS who was working to expedite the adjustment of status application (Govt. Exh. 5 and 6; Tr. 32, 35). Once, in response to Pirani's threat to go to the authorities if the money was not returned, petitioner stated that someone had reported Pirani to the INS as an undesirable alien and that any attempt by Pirani to register a complaint with the agency would "only make trouble for yourself" (Govt. Exh. 7; Tr. 39; Br. 15).

After the arrest, petitioner admitted that she had taken the $800 "to help [Pirani] secure her citizenship papers to remain in the United States" but gave conflicting accounts about what she had done with the money (Tr. 94).

ARGUMENT

Petitioner contends that her solicitation and receipt of the unauthorized payments from Pirani for the purpose of bribing INS officials to secure an adjustment-of-status for Pirani did not occur "in proceedings relating to naturalization" as required by 18 U.S.C. 1422 because petitioner never filed the INS forms that Pirani signed with any government agency.

1. When it was filed, the petition for certiorari was premature in light of the remand order by the court of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R. Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251. We do not interpose that objection at this stage, however, since the motion to suppress has failed and the court of appeals has indicated its intention to affirm the conviction without further hearing. Accordingly, we address the merits of the claim presented by the petition.

2. We submit petitioner is in error in contending that her fraud was not covered by 18 U.S.C. 1422. The statute was enacted in large part to curb the predatory exploitation of aliens seeking protection and benefits under the immigration and naturalization laws.[2]

[2]The earliest version of the statute was contained in the Act establishing a Bureau of Immigration and Naturalization. It prohibited the collection of excessive fees in naturalization matters by "any clerk of any court or his authorized deputy or assistant." 34 Stat. 602. By establishing a fixed schedule of fees and punishing the collection of any moneys other than those authorized, the Act sought to remove the financial incentive for corrupt and lax administration of the immigration and naturalization laws by court officials as well as to insure "that all aliens applying for citizenship shall be subject to the same expense." H.R. Doc. No. 46, 59th Cong., 1st Sess. 25 (1905). The provision was extended in the Nationality Act of 1940, 54 Stat. 1137, to cover "any * * * person * * * whether an employee of the Government * * * or not." 8 U.S.C. (1940 ed.) 746(a)(33). The statute took its present form and was transferred to the criminal code in 1948. 62 Stat. See H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947).

Petitioner does not dispute that obtaining an adjustment of status is a proceeding "relating to naturalization or citizenship or the registry of aliens" under the statute. See *United States* v. *Schaier*, 175 F. Supp. 838 (S.D. N.Y.). Nor does she challenge that the moneys she collected from Pirani were beyond those authorized by law. See 8 C.F.R. 103.7.

Petitioner was plainly engaged in such a scheme and the fraud was complete once petitioner had solicited and received the unauthorized moneys from Pirani by falsely representing that they were necessary to secure a favorable disposition of her application for an adjustment of status.

Petitioner's subsequent failure to file the forms as she had agreed to do did not immunize her from prosecution under the statute. The protection to aliens afforded by the statute would be fatally undermined if a collector of unauthorized fees could escape its penalities simply by electing to compound the fraud by refusing to perform the services for which the payment was given. Both courts below correctly concluded that Congress could not have intended its statutory scheme to be so easily evaded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

SIDNEY M. GLAZER,
MICHAEL E. MOORE,
Attorneys.

JULY 1978.

APPENDIX

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
against
TAHERA WEINSTEIN,

Defendant.

77 Cr. 66 (CMM) No. 47334

METZNER, D.J.:

The Court of Appeals has remanded the above matter to this court for a specific finding "on whether appellant requested a lawyer three times and was refused permission to call a lawyer before the uncounselled interrogation on substantive matters by the Assistant United States Attorney began."

I find that the appellant did not make a request for a lawyer, nor was she refused permission to call a lawyer. She did ask, "will I be permitted to call an attorney? I [Assistant United States Attorney] said yes." However, she did not follow up this inquiry with a request for permission to call an attorney.

So ordered.

Dated: New York, N.Y.
June 21, 1978

/s/ Charles M. Metzner

U.S.D.J.